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ORIGINAL

January 8, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Ms. Salas:

Enclosed please find an original, duplicate, and eleven copies of SBC Communications Inc.'s ("SBC") Petition for Partial Reconsideration of the *Foreign Participation Order*, IB Docket No. 97-142. Please date-stamp and return the enclosed duplicate copy.

Please contact me with any questions. Thank you.

Sincerely,

Gina Harrison

Gina Harrison

Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	IB Docket No. 97-142

PETITION FOR RECONSIDERATION

SBC Communications Inc. ("SBC") hereby requests partial reconsideration of the Federal Communications Commission's ("Commission" or "FCC") decision in the above-captioned *Foreign Participation* rulemaking.[1] SBC concurs with the thrust and the vast majority of the Commission's pro-competitive policies, which implement the liberalization of the Group on Basic Telecommunications ("GBT") agreement and should increase competition in the international market. However, SBC respectfully seeks reexamination of the rules and policies adopted in this proceeding in three areas: *First,* the Commission's requirement that U.S. carriers seek FCC review before acquiring controlling interests in foreign carriers severely disadvantages competing U.S. investors, harms the development of competition in foreign markets and, in any event, exceeds the Commission's statutory authority. *Second,* the Commission's sensible determination to permit U.S. carriers to enter into "special concessions" with non-dominant foreign carriers should be clearly reflected in Sections 43.51(e) and 64.1001 of the Rules and applied non-discriminatorily to all U.S.

[1] *Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order and Order on Reconsideration, FCC 97-389 (Nov. 26, 1997) ("*Foreign Participation Order*").

carriers. *Third,* the Commission impermissibly claims authority to force existing and proposed private submarine cable entrepreneurs to operate on a common carrier basis.

I. ACQUIRING FOREIGN CARRIERS

It has long been the Commission's policy to require prior approval of foreign carrier investment in existing U.S. carriers, but not to require prior approval when a U.S. carrier purchases a foreign carrier.[2] In the instant proceeding, the Commission claims the authority to require prior review should a U.S. carrier – or an entity that controls a U.S. carrier – seek to obtain a controlling interest in a foreign carrier.[3] The Commission asserts that the new policy is required to overcome "significant risks to competition."[4]

On the contrary, the Commission's prior review requirement would create severe competitive disadvantages for potential U.S. carrier investors, and adversely affect the development of competition in foreign telecommunications markets. Normally, to acquire an interest in a privatized foreign telecommunications company, investors are required to submit "unconditional" bids. If U.S. company bids are subject to potential FCC review, they would likely be deemed "conditional" and rejected without consideration.[5] Even if FCC approval in a particular case ultimately could be

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[2] *Foreign Carrier Entry Order*, 11 FCC Rcd 3873, 3912-14 (1995) (finding that requiring prior notification or approval would frustrate U.S. policy of encouraging foreign investment by U.S. carriers).

[3] *Foreign Participation Order*, ¶¶ 140 & 334. *See id.* Appendix C at 4 (setting forth the amended Rule 63.11).

[4] *Id.*, ¶ 140.

[5] For example, Guatemala recently attempted to privatize its telephone company. The final procedure called for the winning bidder to close the deal six days after the winning bid was announced. Because no company would finalize a privatization transaction subject to possible divestment by the Commission, any possibility that the FCC would void such a deal would essentially disqualify all U.S. carrier bidders. A similar result could arise in negotiated privatizations where U.S. carriers

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obtained, foreign carriers would have a substantial time and certainty preference that would significantly disadvantage U.S. companies in a bidding process. Nowhere in the *Foreign Participation Order* does the Commission explain why its new policy would not, as initially concluded, frustrate U.S. investment abroad.[6]

A more appropriate rule would be limited to addressing the conditions under which the acquiring U.S. carrier offers services. Section 214 simply does not cover foreign country *investment* decisions; rather, it gives the agency jurisdiction only over communications between foreign countries and the United States. Thus, the FCC should continue to require the filing of a Notice of Affiliation, and address any competitive issue solely in the context of the purchasing carrier's Section 214 authority – if it exists – to offer service between the U.S. and that foreign market. The Commission could then adopt or modify Section 214 conditions sufficient to protect U.S. consumers and competing carriers.[7]

Even if the policy did not constrain competition nor exceed the FCC's statutory authority, the rule the agency adopted is vague and incomplete. Although the Commission states its intention to apply the ECO test to acquisitions of a controlling interest in carriers from non-WTO member

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would require regulatory review not applicable to non-U.S. companies. Such added uncertainty would make a U.S. bid less valuable to a foreign country.

[6] Placing roadblocks on U.S. company participation in foreign privatizations would deny to U.S. carriers and investors the very benefits of the GBT agreement that the instant proceeding is designed to implement.

[7] SBC is not challenging the FCC's authority to impose conditions on the actual provision of basic telecommunications services between the United States and foreign affiliated markets; such services can affect U.S. commerce and some conditions therefore fall within the agency's statutory jurisdiction.

countries,[8] no standard is elaborated for investments in carriers from WTO member countries. In fact, new Rule 63.11(e)(2) suggests only that such investments may be denied if they fail to satisfy the public interest. The Commission should not adopt a rule that gives regulated companies no guidance on how to conform to its requirements.

Moreover, Rule 63.11(e)(2) is logically inconsistent. It appears to permit the FCC to delay U.S. carriers' consummation of foreign investments pending public interest review. However, in situations where notice is provided pursuant to Rule 63.11(b), the acquisition would already be completed. Thus, the Commission should clarify that Rule 63.11(e)(2) applies only in the case of prior notification pursuant to paragraph (a).

Equally perplexing is the Commission's apparent conclusion that regulatory review of U.S. companies' foreign carrier acquisitions is necessary to conform to the General Agreement on Trade in Services' ("GATS") "national treatment" principle. National treatment, as applied in the United States, is irrelevant to the treatment of a U.S. carrier's overseas investment; it is only relevant to the treatment of acquisitions by U.S. carriers and foreign carriers in the United States.[9] And, any transfer of a controlling interest in a U.S. carrier – whether to a U.S. or foreign entity – already requires prior FCC approval under Section 214. Moreover, as applied to U.S. carriers' investments in WTO countries, the policy is unnecessary because the GBT agreement and Regulatory Reference Paper are founded upon reliance on foreign independent regulators addressing competitive issues arising in their countries.

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[8] *Foreign Participation Order*, ¶ 140.

[9] Indeed, the Commission's reliance on national treatment is particularly anomalous given that the rule was adopted in the context of *non-WTO member nations* to which GATS obligations do not apply. *See id.*

Even if the FCC believes that the national treatment principle is applicable to the situation where a U.S. carrier purchases a foreign carrier, it should not conclude that, as a consequence, it must obtain a right for prior approval. Rather, the Commission should conclude that no such requirement is necessary because both U.S. carriers and foreign carriers receive equal treatment from the United States in their bids for carriers in third countries.

Finally, the Commission failed to provide adequate notice of the new policy. Although the agency mentions applying the ECO test to U.S. carriers that own foreign carriers in non-WTO member countries, the Commission failed to provide notice of its intent to adopt essentially a pre-investment notification process for U.S. investments abroad. Nor is such a policy a logical outgrowth of the *Notice of Proposed Rulemaking*.

SBC suggests that the Commission had this policy right the first time in its *Foreign Carrier Entry Order*. There is no basis or need for expanding the sweep of FCC regulatory process here. Indeed, a requirement for prior agency review when U.S. carriers acquire a controlling interest in foreign carriers would be anti-competitive, inconsistent with law, unnecessary and contrary to the public interest.

II. SPECIAL CONCESSIONS

In the *Foreign Participation Order*, the Commission wisely concludes that the "no special concessions" rule[10] need not be applied to agreements with foreign carriers that "lack market power."[11] In interpreting this rule, the agency adopts a rebuttable presumption that foreign carriers

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[10] *See* 47 C.F.R. §§ 63.14, 63.18(i)(1).

[11] *Foreign Participation Order*, ¶ 160.

with less than a 50 percent share of each relevant foreign market lack market power, *i.e.*, are non-dominant.[12]

SBC concurs in the liberalization of the special concessions policy. Nonetheless, SBC is concerned that the Commission's rules could be misinterpreted to forbid special concessions with foreign non-dominant carriers as well as with foreign carriers that possess market power. Such an error is possible because the FCC fails to amend the language in Sections 43.51(e) or 64.1001, which implement the Commission's *Flexibility Order*.[13] Examining solely those provisions might lead a carrier to conclude that it must obtain a prior accounting rate "modification" – essentially, an FCC waiver – before entering into a special concession with any foreign carrier. If the Commission truly seeks to "narrow [its] No Special Concessions rule in a way that will encourage such arrangements,"[14] it should amend Sections 43.51(e) and/or 64.1001, to make clear that no such prior approval is necessary for special concessions with non-dominant foreign carriers.

SBC is also concerned that carriers may be confused and believe that additional or different special concessions rules apply to BOCs or their affiliates. The *Foreign Participation Order* clearly applies its special concessions rule to any "operating agreements for the provision of basic services" and "distribution arrangements."[15] But, in a proceeding upholding the right of BOC affiliates to terminate traffic "in region,"[16] the Commission concluded that the geographic allocation of

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[12] *Id.*, ¶ 161.

[13] *Regulation of International Accounting Rates*, Fourth Report and Order, 11 FCC Rcd 20063 (1996) ("*Flexibility Order*"), *recon. pending*; 47 C.F.R. §§ 43.51(e), 64.1001.

[14] *Foreign Participation Order*, ¶ 156.

[15] *Id.*, ¶ 165.

[16] *Bell Atlantic Communications, Inc.*, ITC-96-451, Order, Authorization and Certificate, DA 97-285,

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proportionate return traffic – sometimes called "grooming" – would require approval as a special concession.[17] SBC does not challenge this view here; its concern is that some carriers might conclude that the FCC's conditions apply only to BOC affiliate Section 214 grants.[18]

Without particularized findings of fact, it is impermissible to place restrictions on BOC affiliates that do not apply to all carriers.[19] In fact, if grooming with a dominant foreign carrier is a special concession, *any* carrier seeking geographic enrichment of inbound traffic must seek prior approval before it may initiate such arrangements. Many carriers might have varied incentives to groom inbound traffic – for example, to avoid states with relatively higher interstate access charges and to favor states with relatively lower access charges. The FCC has not justified applying its special concession policy solely to BOC grooming arrangements. Thus, the Commission should discontinue its practice of conditioning BOC affiliate authorizations, and declare in the context of this generally applicable rulemaking that the special concession rules will be applied uniformly to all U.S. carriers.

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¶ 27 (Feb. 7, 1997). SBC notes that the distinction between in-region and out-of-region services will soon disappear. *See SBC Communications, Inc. v. FCC*, CA No. 7:97-CV-163-X (N.D. Tex. Dec. 31, 1997).

[17] *Bell Atlantic Communications, Inc.*, ¶ 28.

[18] The condition covers terminating private line resale traffic "in region."

[19] *Compare id.*, ¶ 38 *and Pacific Bell Communications,* DA 97-1928, ¶ 17 (Sept. 7, 1997), *with Cincinnati Bell v. FCC*, 69 F.3d 752, 768 (6th Cir. 1995) ("In the absence of a reasoned explanation as to why the structural separation rule remains viable for Bell Company Cellular providers ... the FCC should reexamine whether the structural separation requirement placed on the Bells still in any way serves the public interest.").

III. CABLE LANDING LICENSES

In the instant rulemaking, the Commission liberalized its policies covering the grant of submarine cable landing licenses, and determined that it would require a compelling public interest reason before denying any future application for undersea facilities between the United States and a WTO country.[20] SBC fully supports this approach. However, the agency also asserts authority to require cable capacity providers to offer services on a common carrier basis, even if the provider has no intention of holding itself out to the public at large.[21] The FCC offers no legal support for this *dicta*, and has established no factual basis in today's market to assume such authority.

The right of submarine cable providers to offer private services is well-established. Long ago, the FCC and the courts permitted domestic radio providers to offer services on a private basis.[22] The Commission has since applied this holding to domestic and international fiber cables,[23] to domestic satellite transponders[24] and to international satellite systems.[25] There is no evidence that this policy has harmed the public interest. Nevertheless, in the instant rulemaking the Commission assumes the right to preclude a cable operator's decision to provide private services.

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[20] *Foreign Participation Order*, ¶ 93.

[21] *Id.*, ¶ 95.

[22] *Land Mobile Service*, 51 F.C.C. 2d 945 (1975), *aff'd sub nom., Nat'l Assn. of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"), *cert. denied*, 425 U.S. 992 (1976).

[23] *Tel-Optik Ltd.*, 100 F.C.C. 2d 1033 (1985); *Norlight*, 2 FCC Rcd 5167 (1987).

[24] *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C. 2d 1238 (1982), *aff'd sub nom., Wold Communications, Inc. v. FCC*, 735 F.2d. 1465 (D.C. Cir. 1984).

[25] *Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 FCC Rcd 5936, 6002-04 (1994) (permitting "Big LEO" providers to offer private services); *International Satellite Systems Separate from Intelsat*, 101 F.C.C. 2d 1046, 1103 (1985) (permitting "separate" satellite systems to offer private services).

Such an attempt by the Commission to expand its regulatory authority lacks a legal foundation. The D.C. Circuit Court of Appeals has already rejected:

> an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve...A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.[26]

Indeed, the Court of Appeals overturned the agency's sole prior effort to mandate that an offering be common carriage. In *Southwestern Bell Telephone Co. v. FCC*,[27] the court remanded for reconsideration the Commission's regulation of dark fiber service on an individual case basis as common carriage. The court held that the Commission failed to provide sufficient support for concluding that the carriers' initial marketplace determination to offer the service on a private basis should be altered.[28] The Commission should heed the court's warnings and preserve the right of undersea cable providers to determine the nature and extent of their customer relationships without agency interference.

The Commission claims that it may compel fiber providers to act as common carriers "when there is a danger of inadequate common carrier capacity."[29] However, an increasing number of international geostationary and low earth orbit ("LEO") satellites provide an ever-growing supply of capacity. The Commission has thus failed to show that there is any need for its expansive assertion of authority to compel common carriage. Absent such a particularized showing of shortage, the

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[26] *NARUC I*, 525 F.2d at 644; *see also United States v. California*, 297 U.S. 175, 181 (1936) (whether a railroad is a common carrier depends "upon what it does").

[27] 19 F.3d 1475 (D.C. Cir. 1994).

[28] *Id.* at 1484.

[29] *Foreign Participation Order*, ¶ 95.

Commission should not, through *dicta* in this proceeding, change the scope of its regulation in this area.

Moreover, any requirement that submarine cable operators provide service on a common carrier basis would be discriminatory. Burdening cable providers without similarly restricting the operation of forthcoming global geostationary and LEO systems competitively disadvantages fiber services. Accordingly, SBC requests the Commission to refrain from encroaching upon the legitimate right of international fiber cable providers to offer service on a private basis.

IV. CONCLUSION

For the foregoing reasons, the Commission should: (1) eliminate the requirement that U.S. carriers seek regulatory review prior to acquiring a controlling interest in foreign carriers; (2) clearly reflect its new special concessions rule in Sections 43.51(e) and 64.1001 of the Rules and apply the policy non-discriminatorily to all U.S. carriers; and (3) reverse its claim that it may force existing and proposed private submarine cables to operate on a common carrier basis.

Respectfully submitted,

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